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No. 90-431

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

STATE, *ex rel.*
THE DISPATCH PRINTING COMPANY,
Petitioner,
v.
THE HONORABLE RONALD L. SOLOVE,
and DAVID L. STRAIT,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

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REPLY MEMORANDUM FOR PETITIONER

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In opposing certiorari, Respondents acknowledge that the lower courts "have reached conflicting decisions concerning closure of juvenile proceedings." Strait Opp. 15. Indeed, Respondent Solove disputes neither the importance of the issues presented nor the depth of the conflicts, choosing only to argue the merits of the decision below. A response to those arguments is best left to consideration of the merits, inasmuch as they provide no basis for denying review. Respondent Strait, however, argues against review by attempting both to deny the importance of the case and to minimize the conflicts it presents. Neither attempt withstands analysis; the first mischaracterizes the decision below, and the second misreads this Court's First Amendment jurisprudence.

A. The Closure Order

1. With respect to the closure issue, Strait initially attacks Petitioner's reading of the Ohio Supreme Court's decision, complaining that "to suggest that the First Amendment was found not to apply to juvenile proceedings is to grossly misstate the holding of the court below." Strait Opp. 9. It is Strait's reading, however, that is untenable. Strait asserts that the Ohio Supreme Court adopted a "First Amendment balancing test," but points to the *statutory* standard developed by the Court after its constitutional analysis had concluded. Strait Opp. 9 n.7; Pet. App. 20a-23a. That standard, to be sure, involves balancing of competing factors, but its statutory underpinning subjects it to change at the whim of the legislature; indeed, the Ohio Supreme Court suggested a statute presumptively closing all juvenile proceedings would pose no constitutional difficulty. *See* Pet. App. 21a. Ultimately, despite Strait's attempt to confuse the issue, the Ohio Supreme Court's actual holding is clear and unequivocal: "[T]here is no qualified right of public access to juvenile court proceedings." Pet. App. 20a. Even Respondent Solove recognizes this holding for what it is—a declaration that the First Amendment simply does not apply to proceedings in juvenile court. Solove Opp. 5. That holding warrants discretionary review.

2. Strait next seeks to minimize the obvious confusion the closure issue has generated in the lower courts by simplistically suggesting that different results are to be expected given the different States involved. This attempt to explain away the conflict fails to take account of the rationale and reasoning actually employed by the lower courts. Far from relying on some unidentified characteristics peculiar to the juvenile courts in a particular State, the differing decisions on this issue have approached the First Amendment analysis much as this Court approached the analogous issues presented in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), and *Press-Enterprise Co. v. Superior Court*, 478

U.S. 1 (1986)—by reference to the type of proceeding as a whole. The Ohio Supreme Court below, for example, did not base its analysis on any feature of juvenile courts unique to Ohio, but on statements made by this Court in cases from other States; its holding therefore stands as support for closure of the juvenile courts in every State. *See* Pet. App. 17a-18a; Pet. 16-17.

Moreover, it is circular to argue that a State may eliminate the public's First Amendment right of access to judicial proceedings by creating "new" tribunals or proceedings and declaring that they are to be closed to the public. The focus should remain on the substance involved, and while juvenile courts per se may be of relatively recent vintage, minors have long been dealt with in court proceedings open to the public. *Cf. Thompson v. Oklahoma*, 487 U.S. 815, 864 (1988) (Scalia, J., dissenting).

3. Finally, Strait makes an emotional plea to deny certiorari on "humanitarian" grounds—namely, to prevent the minor child involved in the custody dispute that spawned this proceeding, Tessa Reams, from continued involvement in a "legal snarl." Strait's rhetoric disregards the facts. After the Ohio Supreme Court's decision below, the custody proceedings for Tessa Reams have gone forward to their conclusion. Indeed, after the unfortunate death of Richard Reams, the public and the press eventually have been afforded full access to those proceedings.

Thus, the minor child is no longer the subject of a continuing "legal snarl," and, contrary to Strait's suggestion (Strait Opp. 26), this Court's review of the decision below will not affect the child's ability "to live a normal life away from the courts and the cameras." Strait Opp. 26. While the resolution of the child's custody does not moot the constitutional issues presented in

this case (Pet. 9 n.5), it does expose Strait's "humanitarian concern" as a charade.*

B. The Gag Order

With respect to the gag order, only Strait even addresses this second, independent question. His discussion of the issue, however, is incomplete; it ignores the substantial conflict in the lower courts, a conflict recognized by Justices White, Brennan, and Marshall in dissenting from the denial of certiorari in *Dow Jones & Co. v. Simon*, 488 U.S. 946 (1988). Moreover, the short response Strait does offer misstates both the Court's recent decision in *Butterworth v. Smith*, 110 S. Ct. 1376 (1990), and the record in this case.

1. Strait asserts that in *Butterworth*, this Court unanimously found that "a blanket prohibition on release of information during the grand jury term . . . did not violate the First Amendment." Strait Opp. 22. This contention is incorrect. In fact, the Court reserved decision on the issue, "express[ing] no opinion on whether a State could prohibit a witness from revealing his testimony" if the "investigation is continued with another grand jury." 110 S. Ct. at 1381-82 n.3; *see also id.* at 1383 (Scalia, J., concurring) ("there is consider-

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* Equally disturbing is Strait's ad hominem attack on the petition's reference to the death of Richard Reams. Strait Opp. 19 n.11. The petition noted that Beverly Seymour told the sheriff who arrested her after the shooting that she had lost all confidence in the integrity of the custody proceedings. Pet. 18. Strait appears to read this reference as suggesting that the proceedings were unfair in some objective sense, criticizing Petitioner for making such an "inflammatory" statement without reviewing the transcripts of the custody proceeding. Strait's reading completely misses the mark. The petition did not suggest that the Juvenile Court conducted the custody hearing unfairly. Rather, to illustrate the need to protect the public's right to observe the operation of its courts, the petition merely observed that the veil of secrecy imposed by the Juvenile Court undoubtedly contributed to Ms. Seymour's reported loss of confidence in the proceedings.

able doubt whether a witness can be prohibited, even while the grand jury is sitting, from making public what he knew before he entered the grand jury room"). Far from supporting the Ohio Supreme Court's decision, as Strait suggests (Strait Opp. 21), *Butterworth* thus demonstrates that even where proceedings have a firm and established tradition of being closed to the public, First Amendment strictures still apply to restraints on speech by the participants. In the case below, in contrast, the Ohio Supreme Court sanctioned the gag order without subjecting it to the scrutiny mandated by the First Amendment.

2. Perhaps to gloss over this harsh holding, Strait badly mischaracterizes the record. In Strait's reconstruction, Judge Solove's use of a "scintilla of possibility of harm" standard and his finding of "a real possibility" of harm (Pet. 5), has now become a finding that lack of a gag order "*would* harm the child and disrupt the proceedings." Strait Opp. 22 (emphasis added). Similarly, Strait converts the Ohio Supreme Court's affirmance after abuse-of-discretion review (Pet. App. 30a) into a finding "that application of [the gag order] was necessary to protect the best interest of the child and to ensure the integrity of the proceeding." Strait Opp. 23. When viewed against the actual record, rather than Strait's recasted version, the weakness of the Ohio Supreme Court's approach to the gag order issue becomes apparent. Certiorari is warranted to clarify the First Amendment standards that should control such an analysis.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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